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IN THE U. S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1149

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,
Petitioner,

vs.

D & L CONSTRUCTION CO. AND ASSOCIATES,
a Joint Venture,

AND

CONTINENTAL CASUALTY CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DOUGLAS STRIPP
CLAYTON R. SMALLEY
LANDON H. ROWLAND
1006 Grand Avenue
Kansas City, Missouri 64106
Attorneys for Petitioner

Of Counsel:
WATSON, ESS, MARSHALL & ENGGAS

E. L. MERIDETHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-2080

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CONTINENTAL CASUALTY CO.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner National Union Fire Insurance Company of Pittsburgh, Pennsylvania, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in the above entitled case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 353 F.2d 169 and is reprinted in the Appendix, p. 5a, *infra*. The opinion of the United States District Court for the Western District of Missouri is reported at 234 F. Supp. 293 and is reprinted in the Appendix, p. 25a, *infra*. A supplemental opinion of the district court dealing with the allowance of pre-judgment interest and attorneys' fees is reported at 238 F. Supp. 815 and, while not germane to the issues presented by this petition, is reprinted in the Appendix, p. 73a, *infra*.

JURISDICTION

The judgment of the court of appeals was dated and entered November 18, 1965, Appendix, p. 22a, *infra*. Petitioner's timely petition for rehearing and motion for transfer to the court of appeals *en banc* were denied on December 27, 1965, Appendix, p. 24a, *infra*. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the district court was based on 28 U.S.C. § 1332 (a)(1). (R. 32)[1]

While the judgment below is not a final judgment since it remanded the case to the trial court for redetermination of damages, it did finally determine the issues on the merits of the case, and this Court has held that it has jurisdiction to review, and will review, the decision of the court of appeals where that decision is contrary to the decisions of this Court and those of other courts of appeals, and the decision is "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U.S.

1. "R." refers to the Record certified to this Court by the court of appeals.

373, 377 (1944); *Land* v. *Dollar*, 330 U.S. 730, 734, n. 2 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n. 3 (1948). That is precisely the situation in this case, since the court of appeals determined that federal law, not state law, governs the issues involved, and remand is for redetermination of damages "consistent with the views expressed in this opinion". Furthermore, this case involves an important and novel question of the application and scope of the rule of *Erie R. R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and petitioner's position, if sustained, would require reversal of the decision below.

This Court granted certiorari under similar circumstances in *Wallis* v. *Pan American Petroleum Corp. et al.*, No. 341, 34 U.S. L. Week 3102 (U.S. Oct. 11, 1965).

QUESTIONS PRESENTED

1. Whether, because a bonded subcontract relates to part of the work required of the prime contractor on a Capehart Act project, the rights and defenses of the subcontractor's surety shall be governed not by the laws of the appropriate state, as required by the constitutional precepts stated in *Erie R. R. Co.* v. *Tompkins* and further required by the Rules of Decision Act, but, instead, by federal judge-made law, and this despite the fact that the surety's bond is merely conventional and neither it nor the subcontract itself is executed under or required or regulated by any law of the United States.

2. Whether and to what extent "the federal interest inherent in Capehart projects" or the "need for uniformity" justifies the imposition of federal judge-made rules of decision in disputes arising out of agreements not governed by any law of the United States.

3. Whether, if federal law governs the rights of parties in disputes arising out of private agreements not governed

by any law of the United States, the federal courts should adopt state rules of decision rather than attempt to create novel and unprecedented federal rules of decision.

4. Whether the terms and conditions of prime contracts with the federal government or its agencies shall be deemed, as a matter of federal judge-made law, to be "incorporated by reference" in subcontracts with such prime contractor even though not so incorporated by the terms of such subcontracts.

5. Whether, in a dispute involving the interpretation of a conventional private surety agreement and the subcontract covered by such agreement, the federal courts may apply the law of a jurisdiction other than that selected by the parties to the subcontract.

STATUTES INVOLVED

This case involves the Rules of Decision Act, 28 U.S.C. § 1652 and 28 U.S.C. § 1352, the Miller Act, 40 U.S.C. §§ 270a and 270b and the Capehart Act, 40 U.S.C. § 1594. The pertinent provisions of these statutes are set forth in the Appendix, *infra*, pp. 1a-4a.

STATEMENT

This diversity case[2] arises out of the default of a subcontractor performing electrical work in the construction of military housing at Fort Leonard Wood, Missouri. The prime contract for this housing was awarded under the Capehart Act[3] to Respondent D & L Construction Com-

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2. Para. 2, Amended Pre-Trial Order (R. 32); Finding of Fact No. 1, 234 F. Supp. at 295.

3. Act of August 11, 1955, c. 783, Title IV, § 403, 69 Stat. 651, as amended by the Act of August 7, 1956, c. 1029, Title V, §§ 506(b)(d), 507, 70 Stat. 1110, 42 U.S.C. § 1594 *et seq.*

pany and Associates[4] a California joint venture. D & L's performance and payment bonds, the only bonds required or mentioned by the Capehart Act,[5] were furnished by Respondent Continental Casualty. The defaulting subcontractor, Mojave, has been adjudged bankrupt and was not a party to the appeal. Mojave's surety, National, is the petitioner here.

The action was originally instituted by Triangle, a materialman of Mojave, against D & L and Continental Casualty to recover the price of certain materials supplied by Triangle to Mojave for use in the performance of Mojave's subcontracts. Count II of Triangle's complaint sought recovery for the same items from National under its bonds. D & L and Continental Casualty thereupon asserted a cross-claim against National, likewise on the basis of its bonds written in Mojave's behalf, to recover from it not only sums for which they might be held liable to Triangle but also for amounts which had been or might be paid by them to satisfy other materialmen's claims and completion costs connected with Mojave's subcontracts.

Summary judgment was granted Triangle against D & L and Continental Casualty on Count I of its complaint, and this judgment was affirmed on appeal.[6] Count II of the

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4. Hereafter Respondents, D & L Construction Co. and Associates, and Continental Casualty Co., will be referred to as D & L and as Continental Casualty, respectively, and their joint pleadings, claims and contentions will be referred to as D & L's; National Union Fire Insurance Company of Pittsburgh, Pennsylvania, will be referred to as National; Mojave Electric Company will be referred to as Mojave; and Triangle Electric Supply Company will be referred to as Triangle.

5. 42 U.S.C. § 1594(a). The Capehart Act requirements respecting the prime contractor's payment and performance bonds reiterated existing requirements of the Miller Act. 49 Stat. 793, 40 U.S.C. § 270a(a)(1) and (2). See *United States* v. *Travelers Indemnity Co.*, 215 F. Supp. 455, 471-474 (W.D. Mo. 1963).

6. *D & L Constr. Co.* v. *Triangle Electric Supply Co.*, 332 F.2d 1009 (8th Cir. 1964).

complaint, against National, was dismissed pursuant to stipulation. Only the cross-claim of D & L and Continental Casualty against National thereafter remained for disposition. After extensive pre-trial proceedings and a short hearing before the court without a jury (R. 129-156), judgment was entered for D & L and Continental Casualty against National in the amount of $711,528.55 plus interest and costs (R. 199).

On National's appeal the court of appeals, affirming in part and reversing in part the decision of the trial court, held, inter alia, that federal law, not state law, governed the interpretation of National's obligation under its surety contract with Mojave; that, as a matter of federal law, the prime contract of D & L was incorporated in the subcontract of Mojave for purposes of determining National's obligations and defenses; and that the subcontract must be construed in light of the prime contract and the Heard and Miller Act cases. It is from this decision that National seeks the grant of a writ of certiorari.

The facts, most of which were stipulated to by the parties and set out in the Amended Pre-Trial Order (R. 32-42), may be summarized as follows: D & L contracted with the Federal Government on August 18, 1959, for the building of 700 units of military housing at Fort Leonard Wood. On the same day it executed with Mojave two separate subcontracts for the installation of electrical facilities called for by the prime contract. The subcontracts were drafted by D & L, in consultation with its legal counsel (R. 33).

Under the terms of Article IV(7) of the *prime contract,* D & L was entitled to monthly advance payments of the prime contract price on the basis of "the total of the purchase price or the estimated cost, whichever is less, of uninstalled acceptable materials suitably stored on the mortgaged property in a manner acceptable to the Con-

tracting Officer, plus the cost of the portions of the work acceptably completed, as approved by the Contracting Officer. . . ." The prime contract also provided that "the Contracting Officer or the mortgagee may require that the eligible builder [D & L] obtain and attach to each application for payment acknowledgments of payment to the date covered by the last advance from all subcontractors and materialmen dealing directly with the eligible builder [D & L]. . . ." (R. 42-44).

Under the terms of the *subcontracts* between Mojave and D & L, however, advance payments of the subcontract prices to Mojave were to be "at the rate of 90 per cent of all material and labor in place as shown on the following schedule: (*Payment to be based on actual progress*)[7] and payment will be made monthly as Contractor receives funds from the lender for same. . . ." (R. 9). Paragraph 9 of the subcontracts provided:

> "Subcontractor shall submit to the Contractor an application for each payment, and releases, receipts or other vouchers evidencing payment for materials and labor together with such additional evidence bearing on the right of the payment claimed as Contractor may direct." (R. 11).

Paragraph 54 of each of these subcontracts provided that they "shall be interpreted by the laws of the State of California" (R. 16).

Before its default Mojave did nothing toward the performance of its subcontracts with D & L other than to order, receive and store certain materials on the job site; it did not pay for them (R. 34). Although the subcontracts required that Mojave submit "a performance and payment bond with good and sufficient sureties . . . which

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7. Italicized portion typewritten into the printed subcontracts.

bond must be . . . submitted by August 29, 1959" (¶1, R. 8), applications for such bonds were not executed and dispatched by Mojave to agents for National until December 19, 1959 (R. 39). Copies of the electrical subcontracts between D & L and Mojave were submitted at the same time for National's use in considering Mojave's application (R. 39).

On October 15, 1959, however, Mojave had submitted to D & L two "subcontractor requisitions for funds" wherein it represented that it was entitled to progress payments for both subcontracts totaling $76,475.29. Mojave submitted no proof, other than its signed inventory, that the material inventories were actually stored on the job site as represented. No "releases, receipts or other vouchers" evidencing payment by Mojave to the materialmen furnishing the materials were presented by Mojave or required of it by D & L (R. 39). None of the materials were incorporated in any structure, and none of the actual installation required by either subcontract had begun.[8]

On November 16, 1959, D & L paid to Mojave the sum of $50,000 as a progress payment based solely on the documents submitted on October 15 (R. 38).

On November 15, 1959, Mojave submitted to D & L two further Subcontractor Requisitions for Funds wherein it represented that it was entitled to progress payments totaling $143,621 (R. 38). A Federal Housing Administration Project Inspection Report, obtained by D & L on November 20 and executed by an officer of the United States Army Corps of Engineers, indicated that as of that date the subcontracts were "0 per cent completed" (R. 39). A certificate appended thereto and executed by

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8. In fact, some of the material listed in those inventories as having been stored on the job site as of October 15, 1959, had not yet been shipped by the supplier (R. 38).

D & L's President indicated that the materials in question were stored on the job site and not "incorporated into the work".[9]

After Mojave was advised by officials of D & L that no further progress payments would be made to Mojave until acceptable evidence was produced that it had obtained the performance and payment bonds required by the subcontracts (R. 40), and after a telephone conversation on December 29, 1959, in which National's agent informed D & L that the bonds in question were in effect, D & L gave Mojave checks in the amounts of $68,373 and $25,248 representing payments purportedly due on the basis of the documents submitted by Mojave on November 15 and the project inspection report obtained by D & L on November 20 (R. 41).

The performance and payment bonds referred to above were delivered by National to D & L on or about January 13, 1960 (R. 42). Shortly thereafter Mojave defaulted under its subcontracts. Due notice of these defaults was given by D & L to National, and D & L demanded, by letter dated April 4, that "in accordance with the terms of Paragraph 4(a) of our two subcontracts with Mojave . . . you, as surety, immediately proceed with the work of said subcontractor" (R. 26). National declined thus to undertake completion of the subcontracts, and D & L thereafter engaged two other subcontractors to complete the work for a total price of $550,625.[10] After these subcontractors

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9. The Record contains extensive testimony by D & L's counsel, Fitzpatrick, as to what he conceived to be the "custom and practice" in financing Capehart projects permitting payments based on inventoried materials (R. 66-68). This evidence was seasonably objected to (R. 66, 67); nonetheless and in the face of the subcontracts' express provision governing payment, the trial court considered the testimony and adopted findings of fact based solely upon it (234 F. Supp. at 298).

10. Exhibits X and Y introduced at trial and omitted from the printed Record by stipulation. This figure was $20,625 more than the total of Mojave's subcontracts (R. 7-16).

likewise defaulted, D & L completed the interior and exterior electrical work with its own forces (R. 3).

D & L's amended cross-claim against National (R. 1-5) alleged execution of the subcontracts and subcontract bonds; Mojave's subsequent default by failure to pay materialmen and perform the construction called for by the subcontract; D & L's own completion of the project; the filing of claims against it by various materialmen furnishing goods to Mojave; D & L's resulting expenditure of sums for legal fees and expenses; and the making of demand upon National to remedy Mojave's default so as to reimburse D & L for its resulting damages.

In its amended answer (R. 18-21), National admitted execution of the bonds in question and Mojave's subsequent default. It went on to plead affirmatively that it was not liable under the bonds because (1) D & L had made premature and improper payments to its [National's] principal, Mojave, and (2) Mojave and D & L had fraudulently concealed from it, before execution of the bonds, the fact that such an improper payment had already been made and the circumstances surrounding it.

Stipulations of the parties on many factual matters were embodied in the Amended Pre-Trial Order entered April 13, 1964 (R. 32-42). The order set out the background facts given above and listed the various items of damage claimed.

After a short hearing without a jury (R. 129-156), the parties were directed to furnish their requested findings and conclusions (R. 156-198), with supporting briefs. Various contentions of the parties material to this petition and the trial court's rulings thereon as contained in its initial memorandum opinion, reported at 234 F. Supp. 293, may be summarized as follows:

Applicable Law. Throughout the proceedings below, D & L contended that the parties' rights were controlled

by the law of Missouri (where the subcontracts were to be performed), while National, relying on the stipulation for the applicability of California law in Paragraph 54 of the subcontracts (R. 16), asserted that California law should be applied. The trial court accepted neither of these positions and, instead, held that it must look to "the rules of decision developed under the Heard and Miller Act decisions." 234 F. Supp. at 305.

The trial court went one step further and concluded that "all substantive provisions of the Miller Act and the Capehart Act would be read into all performance and payment bonds required in connection with any government housing projects constructed under the Capehart Act" (234 F. Supp. 310), and that *American Cas. Co.* v. *Brezina Constr. Co.*, 295 F.2d 603 (8th Cir. 1961), required National's bonds to be construed "in light of" the prime contract and the Miller and Capehart Acts. 234 F. Supp. 310.[11]

The decision of the trial court suggested that this result was required by the uniformity which it sought "in connection with all the various problems growing out of the extensive Capehart litigation with which we have dealt," referring to *Travelers Indemnity* v. *Fine*, 215 F. Supp. at 466-475 (W.D. Mo. 1964). 234 F. Supp. at 309.

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11. Additional considerations which apparently led the trial court to reach the conclusion respecting incorporation of Miller and Capehart Act provisions as well as the terms of D & L's prime contract with the government into subcontract bonds included the following: (1) The bonds involved in the case made specific reference to the subcontracts between D & L and Mojave, and these subcontracts, in turn, showed "on their faces" that each subcontract was a part of the Capehart housing to be constructed at Fort Leonard Wood, (2) both subcontracts specifically incorporated all the "contract documents" of D & L's prime contract into each subcontract, (3) "the interdependence" of payment procedures of the prime contract and subcontracts, and (4) "all parties were bound to know the procedures for payments to the prime contractor as detailed in Article 4 of the prime contract" (234 F. Supp. 306-307).

Propriety of Payments to Mojave and Discharge of National Union. On this issue National contended that D & L's payments to Mojave had been improper because such payments were for "inventoried" materials and were not "based on actual progress" and for "material and labor in place" within the meaning of the provisions of the subcontract. National also objected to D & L's failure to require of Mojave, before payments were made, "releases, receipts or other vouchers evidencing payment [by Mojave] for materials and labor" as provided in paragraph 9 of the subcontracts. National's position was that under California law, a surety is exonerated *in toto* if the terms of the bonded contract are departed from in any material respect, regardless of whether there was any actual prejudice proved.

D & L's position was that the subcontracts were to be interpreted by Missouri law and were to be read in conjunction with its own prime contract with the government, which permitted payments to D & L for merely stockpiled materials. It also contended that the subcontract provision requiring releases and receipts was merely a discretionary matter which it could enforce if it was itself required to furnish those documents to the government or the lender. D & L contended that under the law of Missouri discharge could be, at most, *pro tanto,* and that the surety had the burden of proving actual prejudice and its extent.

The trial court disagreed with both D & L and National as to the question of state law. It held that federal law governed and that the subcontracts and bonds, when "read in light of" the prime contract and applicable federal statutes, authorized the payments in question. 234 F. Supp. 311-315.

On appeal the court of appeals affirmed the trial court's conclusions as to the applicable law, holding that the rules of decision "developed under the Heard and Miller Act

decisions" governed the case and that the surety on a subcontractor's bond, even though not required by any federal law and secured only at the request of the prime contractor, is held to the same rules of construction and contractual liability as the surety for the prime contractor. 353 F.2d at 171-172.[12] Consistent with its affirmance on the choice of law question and the issue of "incorporation" of the prime contract into the subcontract as a matter of federal law, the court of appeals also affirmed the trial court's conclusion that D & L's payments on the Mojave subcontract did not materially vary the payment provisions of that subcontract. 353 F.2d at 174-175.[13]

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12. The court of appeals expressly rejected National's contention that because the subcontracts between D & L and Mojave specifically stated "this contract shall be interpreted pursuant to the laws of the State of California," the obligation of the surety under the bonds in question was to be determined by the law of California. *Ibid.* The court of appeals correctly but inconsistently also ruled that National's rights and liabilities as surety must be measured by those of Mojave, its principal. 353 F.2d at 175.

13. It is true the court of appeals affirmed the trial court's "finding on conflicting evidence that National before executing the bonds had knowledge that such payments on inventory were customarily made on such projects and were in fact being made on this particular project, and that National had consented to such payments." There is, however, no evidence and no finding that National knew or consented to the payment of $50,000 to Mojave on November 16, 1959 (R. 38). 234 F. Supp. 301. Furthermore, the quoted "finding" is not effective to bar National's discharge under California law because it reaches only one of the two grounds on which National claimed discharge by reason of material variance of the subcontracts' terms. The finding refers only to National's claim for discharge based on D & L's material variance of "the material in place" provision of the subcontract (R. 9). The other and even more important ground for National's discharge is the subcontract provision requiring that Mojave submit to D & L an application for each payment for work in place, *together with releases, receipts or other vouchers evidencing payment by Mojave to its suppliers for materials and labor* (R. 11). There was no evidence, and neither court found, that National knew of or consented to the fact that D & L made payment to Mojave without proof of compliance with this provision. It is therefore clear that the result reached by the trial and appellate courts could have been reached only on the ground that, because federal and not state law governed this case, National was bound by the payment procedures provided in the prime contract with which it had nothing whatever to do.

Finally, and despite its holding that the applicable law was federal, the court of appeals held that National's liability under the subcontracts and bond for interest, including prejudgment interest, must be determined by state law. 353 F.2d at 176-177. Because of its ruling on the coverage of the bonds, the question of rights to allowance of attorneys' fees was not resolved, but the court indicated it would apply state law on this question also. 353 F.2d at 176. No reason was given for the application of "federal" law to determine National's defenses under its agreement with Mojave while state law was applied to determine National's liability under that same agreement for interest and attorneys' fees.

REASONS FOR GRANTING THE WRIT

I. The Importance of the Questions Presented.

There are nine important reasons why the writ should be granted in this case:

1. The decisions of the courts below that federal law is to be applied in this case conflict with this Court's decisions in *Erie R. R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938); *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 202-204 (1955); *Bank of America* v. *Parnell*, 352 U.S. 29, 33-34 (1956); *Regents of the University System* v. *Carroll*, 338 U.S. 586, 594-602 (1950); and *United States* v. *Yazell*, 34 U.S.L.Week 4067 (1966).

2. By their application of federal law in this case, the decision of the courts below ignore or misapply the Rules of Decision Act, 28 U.S.C. § 1652 (1958).

3. This Court has already decided in this term *United States* v. *Yazell*, 34 U.S.L.Week 4067 (1966), a significant case dealing with an important aspect of the continuing problem of the interaction of federal and state laws in our complex federal system, and

applying state law in a case involving the direct rights of the United States. This petition for certiorari also presents questions which are similar to those before the Court in *Floyd A. Wallis* v. *Pan American Petro. Corp.*, No. 341, *cert. granted*, 34 U.S.L.Week 3102 (U.S. Oct. 11, 1965). In the present case, as in the *Yazell* and *Wallis* cases, the courts below decided an important question of the applicability of federal law and its scope, which has not been, but should be, settled by this Court.

4. The decisions of the courts below requiring the application of federal law and the incorporation of federal statutes and prime contracts into private non-statutory subcontracts and other arrangements only, at most, remotely connected with federal programs are of incalculable significance and will directly affect thousands of private transactions with no material bearing upon the administration of any federal statute or upon federal construction and procurement practices and will radically change the rules by which those transactions are planned and executed.

5. The decisions of the courts below conflict with those decisions of the federal courts in other circuits where state law was applied in the context of Government contract disputes and jurisdiction was based on diversity of citizenship. *Carruth* v. *Standard Acc. Ins. Co.*, 329 F.2d 690 (5th Cir. 1964); *Socony Vacuum Oil Co.* v. *Continental Cas. Co.*, 219 F.2d 645 (2d Cir. 1955); *Ogden Elec. Co.* v. *Engineers Ltd.*, 151 F.2d 657, 659 (10th Cir. 1945); *Glens Falls Indemnity Co.* v. *American Seating Co.*, 248 F.2d 846, 849 (9th Cir. 1957); *General Elec. Co.* v. *Southern Constr. Co.*, 229 F. Supp. 873, 876 (S.D. La. 1964). The decisions of the lower courts in this case also conflict with those decisions of other federal courts where jurisdiction was based on 28 U.S.C.A. § 1352 and the provisions of the Miller Act,[14] but where the courts nonetheless applied state

14. 49 Stat. 793, 40 U.S.C. § 270a *et seq.*

law because of the essentially private nature of the rights and contracts in dispute. *Continental Cas. Co.* v. *Schaefer*, 173 F.2d 5 (9th Cir.), *cert. denied*, 337 U.S. 940 (1949); *Sam Marci & Sons* v. *United States*, 313 F.2d 119, 124 at n. 1 (9th Cir. 1963); *Central Steel Erection Co.* v. *Will*, 304 F.2d 548, 554 (9th Cir. 1962); *Lichter* v. *Henke Constr. Co.*, 157 F.2d 13, 24 (8th Cir. 1946); *Blair* v. *Gregory-Hogan*, 147 F.2d 840, at 849 (8th Cir. 1945); *D. W. Winkelman* v. *Barr*, 178 F.2d 341, 343 (6th Cir. 1949); *Frommeyer* v. *L & R Constr. Co.*, 139 F. Supp. 579 (D. N.J. 1956); *Gillioz* v. *John Kerns Constr. Co.*, 50 F. Supp. 692 (E.D. Ark. 1943); *First Camden Nat. Bank* v. *Aetna Cas. & Sur. Co.*, 43 F. Supp. 596, 601 (D. N.J.), *aff'd*, 132 F.2d 114, 116 (3d Cir. 1942); *United States* v. *Rogers & Rogers*, 161 F. Supp. 132, 134-135 (S.D. Calif. 1958).

6. The fact that Congress over a long period of time has taken no action to change long-settled ways of handling problems as to applicable law, either in subcontract disputes in federal court merely because of diversity of citizenship or for suits actually filed under the Miller and Capehart Acts, further demonstrates the importance of the questions presented in this petition. "Congress has not seen fit to change the rules . . . fashioned in these cases"[15] despite its opportunity during the formulation of extensive legislation on Government building programs,[16] to overrule all of the cases cited above and to replace state law with uniform federal rules.

7. The decisions below that all terms of Miller and Capehart Act prime contracts are to be incorporated

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15. *Meyer* v. *United States*, 375 U.S. 233 at 239 (1963). See also *United States* v. *Standard Oil Co.*, 332 U.S. 301 at 310 (1947).

16. *E.g.*, 46 Stat. 1494 (1931) as amended, 40 U.S.C. § 276a (1958) (regulation of wages); 74 Stat. 740 (1960), 41 U.S.C. §§ 51-54 (Supp. II, 1961) ("anti-kickback" statute); 65 Stat. 7 (1951), 50 U.S.C. App. Secs. 1211-12 (1958) (renegotiation of contracts and subcontracts); 10 U.S.C. § 2301 (1958), 67 Stat. 232 (1953), as amended, 15 U.S.C. §§ 637-38 (1958); 69 Stat. 580 (1955), 50 U.S.C. App. Sec. 2151 (1958).

into subcontracts thereunder, and that the subcontracts are to be construed according to the Miller and Capehart Acts, directly conflict with the decision of this Court in *Guerini Stone Co.* v. *Carlin Constr. Co.*, 240 U.S. 264 (1915).

8. The failure of the courts below to consider the constitutional and statutory implications of their decisions respecting the applicable law and its scope, and their rejection of the parties' choice of California law, demonstrate that they have so far departed from the accepted and usual course of judicial proceedings, and that the court of appeals has so far sanctioned such departure by the trial court, as to call for an exercise of this Court's power of supervision to correct instances of the improper administration of governing legal rules. Such failure by the lower courts to follow the standards enunciated in *Erie R. R. Co.* v. *Tompkins, supra*, p. 14; *Bank of America* v. *Parnell*, 352 U.S. 29 (1956), and *Guerini Stone Co.* v. *Carlin Constr. Co., supra*, or to adhere to the statutory command of the Rules of Decision Act, fully justifies the grant of certiorari to correct a serious instance of improper administration of the *Erie* rule and to prevent that rule's erosion. See *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U.S. 500 at 509 (1957).

9. The lower courts relied on "the federal interest inherent in Capehart projects" and the "need for uniformity", to justify their choice of law. They did so, however, without making the careful analysis of any such "federal interest," which is required by such decisions as *Bank of America* v. *Parnell, supra*, and *Regents of the University System* v. *Carroll, supra*. This failure again demonstrates that the lower courts here have so far departed from the accepted and usual course of judicial proceedings, and that the court of appeals has so far sanctioned such a departure by the trial court, as to call for an exercise of this Court's power of supervision to correct these instances of abuse of the governing legal standard. *Rogers* v. *Missouri Pacific R. R. Co., supra*.

II. As to Whether the Applicable Law Is State or Federal.

A. The decisions of the courts below conflict with decisions of this Court and fail to follow the Rules of Decision Act.

The decisions below are wrong and they are wrong in a way that is destructive of the constitutional principles which control "the interaction of federal and state laws in our complex federal system". *United States* v. *Yazell*, 34 U.S. L.Week 4067 (1966).

Specifically this case raises questions fundamental to the application of the constitutional principle stated by Mr. Justice Brandeis in *Erie R. R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938), that the federal courts are without power to declare substantive rules of common law in any case, except in matters governed by the federal Constitution or by Acts of Congress. This case raises equally important questions respecting the duty of the lower federal courts to obey the command of the Rules of Decision Act, 28 U.S.C. § 1652 (1958), that "the laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply." The decisions of the courts below are exceptional for their stated conclusion that federal law must be created and applied to govern the private rights of private parties in any way connected with a government housing project despite the lack of a federal statutory or other federal interest in the parties or their rights *inter sese*, and for their unstated conclusion that state law may be ignored in such situations.

Originally this case involved only one issue: Who is to bear the burden of Mojave's default—D & L, the prime contractor and Continental Casualty, its surety, or National, Mojave's surety. All of the materialmen, the persons whom the Miller and Capehart Acts were designed to protect, have

been paid. The Fort Leonard Wood structures have been built and paid for, and the federal government cannot be affected one whit whether D & L's or Mojave's surety shoulders the loss arising out of Mojave's default. Both the federal government and all materialmen and laborers at Fort Leonard Wood were completely and effectively protected by the prime contract bonds. Only those bonds were required by federal statute, because only those bonds involved federal interests. Mojave's subcontract bonds were required by D & L, not by the federal government, and were required for the sole purpose of protecting D & L. D & L lost this protection and National was freed of any obligations to D & L because, under the law of California, D & L's failure to discharge its duties toward its surety and to comply with the payment procedures in its own subcontracts discharged National *in toto*.[17]

The trial court acknowledged that the subcontract bonds in dispute are neither Miller Act nor Capehart Act bonds—*i.e.*, that they were not required by either statute. 234 F. Supp. at 306. In any case, this Court has expressly ruled that the Miller Act was not intended to change those equitable suretyship principles "so deeply embedded in our commercial practice, our economy and our law." *Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132, 140 (1962).

It is noteworthy, moreover, that this is a diversity action and nothing more[18] (though "it is the *source* of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing

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17. California Civil Code § 2819 and § 1787 (1962); *First Congregational Church* v. *Lowrey*, 175 Cal. 124, 165 Pac. 440 (1917); *Pacific Coast Engineering Co.* v. *Detroit Fid. & Sur. Co.*, 214 Cal. 384, 5 P.2d 888 (1931); *Glenn County* v. *Jones*, 146 Cal. 518, 80 Pac. 695 (1905).

18. Para. 2, Amended Pre-Trial Order, R. 32; Finding of Fact No. 1, 234 F. Supp. at 295.

law").[19] The bonds sued upon were not "executed under any law of the United States" (28 U.S.C. Sec. 1352), and the case does not involve any issue "arising under the Constitution, laws or treaties of the United States" (28 U.S.C. Sec. 1331). There is, therefore, no basis for federal jurisdiction in this case other than diversity of citizenship. Except for the accident of diversity, D & L would have been required to initiate its action against National in a state court. *Gully* v. *First Nat. Bank*, 299 U.S. 109 (1936). As in *Trimount Dredging Co.* v. *United States Fid. & Guar. Co.*, 166 Md. 556, 171 Atl. 700 (1934), a suit by a subcontractor involved in a Heard Act project brought in state court because of lack of diversity of citizenship between the parties, the law to be applied would be that of the state.

On this record and under the Court's earlier holding in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), the trial court should have applied the conflict of laws rule of Missouri to determine the state law governing the substantive rights and obligations of the parties.[20] Missouri conflicts law,[21] when considered with the express provision of the subcontract requiring the application of California law,[22] should have led the trial court (and the court of appeals) to proceed in a conventional way with the application of California law, and to resolve the basic question as to who was to bear the burden of Mojave's default.

Neither court, however, heeded the requirements of *Erie* and its progeny, or the Rules of Decision Act, but instead

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19. *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.*, 234 F.2d 538, 540-541, n. 1 (2d Cir. 1956).

20. The court of appeals had so held in a Miller Act case, *Lichter* v. *Henke Const. Co.*, 157 F.2d 13 (8th Cir. 1946).

21. *Fidelity Loan Securities Co.* v. *Moore*, 280 Mo. 315, 217 S.W. 286 (1919).

22. *Mass. Bonding & Ins. Co.* v. *Feutz*, 182 F.2d 752, 756-757 (8th Cir. 1950).

created out of whole cloth a federal rule that is totally novel and far-reaching. The rule is even more than these things, however, for it refers to no established state rules of contract bond interpretation; it remains indefinite and potentially without limit in its application to cases and lawsuits of this kind. This case, therefore, represents exactly that kind of judicial lawmaking which, as Mr. Justice Brandeis concluded, is without the sanction of the Constitution or the Acts of Congress.

Because the courts below did not follow the clear commands of *Erie* or the Rules of Decision Act, this case reintroduces or compounds the uncertainty which *Erie* sought to eliminate. As the court said in *Continental Cas. Co.* v. *Schaefer*, 173 F.2d 5, at 8 (9th Cir.), *cert. denied*, 337 U.S. 940 (1949):

> "The rights and liabilities of the parties under the subcontract should not depend on the choice of forum sought to enforce those rights."

Yet that is precisely the result which will follow from the decisions here: The rights and liabilities of the parties will depend on the choice of forum in which those rights are adjudicated. This case is a perfect example of the significance of the parties' choice of forum. Had D & L sued National in state court, the law of California or that of Missouri would have been applied. Neither party claimed to the contrary. Under those laws National's obligations were limited to the terms and conditions of the subcontract and bond, and D & L's departures from the payment provisions in the subcontract would have effected a discharge of National *in toto* or *pro tanto*. Because the lawsuit was tried in federal court, however, National's obligations were construed "in light of" the prime contract and decisions under the Heard, Miller and Capehart Acts, with

the unexpected result that National became liable under its bond. The courts below were oblivious to these considerations. Neither the court of appeals nor the trial court referred at any point to *Erie* or to the Rules of Decision Act;[23] neither court considered the evil of forum shopping which their opinions resurrect.

The significance of the decision that federal law should be applied to the issues arising between these parties cannot be overstated. Over 1,000 cases arising under the Miller Act[24] have been filed in the United States District Courts each year between 1961 and 1964, inclusive.[25] The figures supplied by the Administrative Office of the United States Courts do not show the number of diversity cases involving Miller Act and Capehart Act subcontractors or suppliers; nor do they show the number of state cases involving such

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23. As the trial court recognized, its choice of federal laws came as a complete surprise to all parties. 234 F. Supp. at 310. The entire choice of law question was exhaustively briefed on appeal, however, at pp. 26-48 of National's initial brief. Furthermore the principal thrust of National's petition for rehearing and motion for transfer to the court of appeals *en banc* was that the choice of law decisions of the trial court and the court of appeals were erroneous under *Erie* and the Rules of Decision Act and in conflict with the decisions of other federal courts.

24. Although there are no statistics as to the number of contract bond cases filed in the various state and federal courts, Miller Act cases raise identical questions respecting the governing law.

25. During the fiscal year ending June 30, 1964, 1,053 actions under the Miller Act were commenced in the United States District Courts. Table C-2, p. 218, Annual Report of the Director of the Administrative Office of the United States Courts (1964). There were 1,092 Miller Act cases commenced during the fiscal year ending June 30, 1963. Table C-2, p. 198, Report of the Proceedings of the Judicial Conference of the United States (1963). During the fiscal year 1962 there were 1,000 Miller Act cases commenced. Table C-2, p. 196, Annual Report of the Director of the Administrative Office of the United States Courts (1962). 1,333 cases under the Miller Act were commenced in the fiscal year 1961. Table C-2, p. 238, Annual Report of the Director of the Administrative Office of the United States Courts (1961).

issues.[26] The decisions below would require the application

26. A showing of the number of cases actually litigated would, of course, only scratch the surface. The uncertainty created by the decisions of the courts below would be felt in an even greater number of procurement transactions where the federal government was "involved". As the Subcommittee on Federal Procurement and Regulation reported:

> "It is impossible to portray the scope of Federal procurement. The Department of Defense alone issues some 10 million contract actions annually. The estimated dollar range of Federal procurement obligations is shown by Budget Bureau statistics as follows for the fiscal year 1965:
>
> | | *Billions* |
> |---|---|
> | Contractual services and supplies: | |
> | Travel and transportation of persons | $ 1.262 |
> | Transportation of things | 2.989 |
> | Rent, communications, and utilities | 2.258 |
> | Printing and reproduction | .266 |
> | Other services | 20.441 |
> | Services of other agencies | .846 |
> | Supplies and materials | 20.896 |
> | Total | 48.959 |
> | Acquisition of capital assets: | |
> | Equipment | 14.971 |
> | Lands and structures | 4.574 |
> | Investments and loans | 9.912 |
> | Total | 29.457 |
> | Grand total | 78.416 |
>
> In addition to such annual outlays are the estimated Federal real and personal property holdings, generally computed at acquisition cost, as of June 30, 1964:
>
> | | *Billions* |
> |---|---|
> | Personalty | $230 |
> | Realty | 94 |
>
> It is obvious that the questions of how the functions of procurement, transportation, storage, issuance, and disposal are done—and where, when, and by whom—vitally affect our economy. These activities have great impact even on an economy with an anticipated gross national product of $660 billion in 1965."

Staff of the Subcommittee on Federal Procurement and Regulation of the Joint Economic Committee Congress of the United States, 89th Cong., 1st Sess., Report on the Economic Impact of Federal Procurement 1-2 (Joint Comm. Print 1965).

In Missouri alone, there were military procurement actions in 1964 totaling $1,349,071,000. Staff of Subcommittee on Federal Procurement and Regulation, Joint Economic Committee, 89th Cong., 1st Sess., Background Material on Economic Impact of Federal Procurement 10-11 (Joint Comm. Print 1965).

of federal law to determine the outcome of all such disputes between private parties to a transaction somehow touched by the federal presence, no matter how remotely. The decisions below thus greatly extend the federal presence and thrust it into otherwise private transactions, causing surprise and confusion to all concerned. The most immediate practical effect of the decisions below is to render uncertain the law by which any transaction between private parties incidentally involved in a public works project is to be governed, and to recreate and revive the pernicious situation which *Erie* was intended to eliminate.

Consistent with their indifference to *Erie* and the Rules of Decision Act, the opinions of the courts below fail to mention or consider the conflict of their determinations with this Court's decisions in *Bank of America* v. *Parnell*, 352 U.S. 29, 33-34 (1956), and *Regents of the University System* v. *Carroll*, 338 U.S. 586, 594-602. As recently as January 14, 1966, in *United States* v. *Yazell*, *supra*, p. 14, this Court said:

> "None of the cases in which this Court has devised and applied a federal principle of law superseding state law involved an issue arising from an individually negotiated contract." 34 U.S.L.Week at 4070.

If anything, the present case is *a fortiori* to *Yazell*. Here, unlike that case, there is not the unqualified federal interest there must be when the United States sues to protect its rights in a transaction and under an agreement to which it is a party. This case is precisely one of those which this Court distinguished in *Yazell*: The issue of National's exoneration and discharge from liability under its subcontract bond arises from an individually negotiated surety agreement between National and Mojave, the subcontractor. That issue can only properly be decided by the analysis and application of state law.

National's petition herein also presents questions which are similar to those now before the Court in *Floyd A. Wallis* v. *Pan American Petro. Corp.*, No. 341, *cert. granted*, 34 U.S.L. Week 3102 (U.S. Oct. 11, 1965). The issue in the *Wallis* case is whether state or federal law governs the adjudication of a dispute among three private individuals over their respective interests in an oil and gas lease issued by the United States under the Mineral Leasing Act of 1920,[27] and whether Louisiana's refusal to recognize estoppel as a basis for obtaining an interest in a mineral lease bars one party's claim. Reversing the decision of the trial court which followed Louisiana law [200 F. Supp. 468 (E.D. La. 1961)], the court of appeals held that in light of the "comprehensive scheme of federal regulation" embodied in the Mineral Leasing Act, the "interest of the United States [was] directly affected" by the controversy between the parties so as to make federal rather than state law applicable in determining the merits of the claims. 344 F.2d 432; *opinion on rehearing*, 344 F.2d 439, 441, 442 (5th Cir. 1965). In the present case, the courts below incorrectly decided important questions of the applicability of federal law and the scope of that law in an expanding area of civil litigation. Those questions are surely as important as those considered in the *Yazell* and *Wallis* cases and they have not been, but should be, settled by this Court.

B. The decisions of the courts below conflict with the decisions of lower federal courts in other circuits and with decisions in the Eighth Circuit itself.

The decision of the court of appeals is in conflict with the decisions of the courts of appeals in the Second, Fifth, Sixth, Ninth and Tenth Circuits; it also appears to be in conflict with other decisions in the Eighth Circuit itself. All

27. 41 Stat. 437, as amended, 30 U.S.C. § 181 *et seq.*

of these decisions, in varying kinds of private disputes between private parties, not even as remote from some "federal interest" as is the controversy in this case, are unanimous in holding that suits between private parties to subcontracts for work on government jobs are within the *Erie* rule and, therefore, that state law must be applied. These decisions fall into two catagories: First, there are diversity cases, like the case at bar, where there is or should be no dispute about the application of the *Erie* doctrine; second, there are other cases where the jurisdiction of the court was dependent upon 28 U.S.C. § 1352 and the provisions of the Miller Act, but where the court nonetheless applied state law because of the essentially private nature of the rights and contracts in dispute.

The most emphatic and helpful of those decisions in the first catagory, *i.e.*, diversity cases, are *Carruth* v. *Standard Acc. Ins. Co.*, 329 F.2d 690, 691-692 (5th Cir. 1964), and *Socony Vacuum Oil Co.* v. *Continental Cas. Co.*, 219 F.2d 645 (2d Cir. 1955). *Carruth* was an action on a subcontractor's bond where the issue was whether the bond covered rental on heavy equipment left on the job by a sub-subcontractor when it abandoned the project, and thereafter used by the subcontractor to complete the work. The trial court held that the bond did not cover the rental, even though the application of "federal law" would have required a different conclusion. The court of appeals affirmed, holding that state law controlled because "the payment bond in question was private or conventional, as distinguished from statutory, and . . . the parties were therefore at liberty to make the bond as broad or as narrow as they pleased and to have it cover anything they specify." 329 F.2d at 691-692.

In the *Socony Vacuum* case plaintiff was a materialman of the subcontractor who failed to perfect his rights against the surety on the prime contractor's payment bond with-

in the time limit provided in the Miller Act, 40 U.S.C.A. § 270b(a). Plaintiff therefore filed an action in the United States District Court to recover from the subcontractor's surety. Reversing the trial court's dismissal of plaintiff's complaint, the court of appeals held that, notwithstanding plaintiff's failure to file a timely claim under federal law against the prime contractor's surety, it was not precluded from recovering the amount of its claim from the subcontractor's surety. On the choice of law question, the court said there was nothing in the record to show the parties to the bond contemplated that it was to be interpreted or governed by the law of a particular state, and accordingly, under *Erie R. R. Co.* v. *Tompkins*, the problem was determined by the law of Vermont. 219 F.2d at 647.[28]

Even cases filed under the Miller Act recognize that state law should be applied to essentially private rights not dependent on the construction of federal statutes and not involving the United States as a party, although the federal court acquired jurisdiction by virtue of a statutory jurisdictional grant.[29]

The clear conflict between the decisions below and the decisions of other courts of appeals serves to emphasize the importance of the conflict between decisions within the Eighth Circuit itself. Thus the decisions in the instant

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28. *Accord, Ogden Elec. Co.* v. *Engineers, Ltd.*, 151 F.2d 657, 659 (10th Cir. 1945); *Glens Falls Indem. Co.* v. *American Seating Co.*, 248 F.2d 846, 849 (9th Cir. 1957); *General Elec. Co.* v. *Southern Constr. Co.*, 229 F. Supp. 873, 876 (W.D. La. 1964).

29. *E.g., Lichter* v. *Henke Constr. Co.*, 157 F.2d 13 (8th Cir. 1946); *Continental Cas. Co.* v. *Schaefer*, 173 F.2d 5 (9th Cir.), *cert. denied*, 337 U.S. 940 (1949); *D. W. Winkelman* v. *Barr*, 178 F.2d 341, 343 (6th Cir. 1949); *Frommeyer* v. *L & R Constr. Co.*, 139 F. Supp. 579 (D. N.J. 1956); *Gillioz* v. *John Kerns Constr. Co.*, 50 F. Supp. 692 (E.D. Ark. 1943); *Sam Marci & Sons* v. *United States*, 313 F.2d 119, 124 at n. 1 (9th Cir. 1963); *Central Steel Erection Co.* v. *Will*, 304 F.2d 548, 554 (9th Cir. 1962).

case conflict with those in *Lichter* v. *Henke Constr. Co.*, 157 F.2d 13, 24 (8th Cir. 1946) and *Blair* v. *Gregory-Hogan*, 147 F.2d 840 at 849 (8th Cir. 1945). State law was applied to resolve disputed issues in both *Lichter* and *Blair* even though those cases were brought under the Miller Act. Yet neither of the courts below referred to or distinguished *Lichter* and *Blair* in their opinions.

Prior to the decision in the present case, but subsequent to the *Lichter* and *Blair* decisions, the trial court had decided *United States* v. *Travelers Indem. Co.*, 215 F. Supp. 455 (W.D. Mo. 1963), a Miller Act case arising under 28 U.S.C. § 1352. There it stated: "the rules of decision that will be applied to the factual situations involved in the various cases [meaning all of the Capehart Act cases pending in the Southern Division of the Western District of Missouri] will be the rules of decision developed under the Heard and Miller Act decisions," and state law was held to be inapplicable. 215 F. Supp. at 474. This holding was adopted by the Eighth Circuit Court of Appeals in *D & L Construction Co.* v. *Triangle Electric Supply Co.*, 332 F.2d 1009, 1012 (8th Cir. 1964).[30] The correctness of these conclusions is only indirectly before the Court as it considers this petition since both the trial court and the court of appeals were considering, in the cited cases, problems of liability under *prime contract bonds* required by an act of the United States and jurisdiction was based on Section 1352 of Title 28. That is not the case here: The bonds now in dispute were not required by any act of the United States and are, for lack of a better term, "private" bonds. Notwithstanding this important distinction, there are sound reasons for also doubting, in the context of "federal ques-

30. The decision to apply an undefined judge-made federal law in all cases "involved" in "Capehart and Miller Act litigation" did not achieve doctrinal absoluteness in the Eighth Circuit, however, until the present case was decided.

tion" litigation, the validity of the rule of decision adopted by the courts below in the *Triangle* and *Traveler's* cases, *supra*. See, *e.g.*, *Lichter* v. *Henke Constr. Co.*, 157 F.2d 13 (8th Cir. 1946); *Continental Cas. Co.* v. *Schaefer*, 173 F.2d 5 (9th Cir.), *cert. denied*, 337 U.S. 940 (1949); *D. W. Winkelman* v. *Barr*, 178 F.2d 341, 343 (6th Cir. 1949); *Sam Marci & Sons* v. *United States*, 313 F.2d 119, 124 at n. 1 (9th Cir. 1963); *Central Steel Erection Co.* v. *Will*, 304 F.2d 548, 554 (9th Cir. 1962).

This reference to the development of the Eighth Circuit's rule of decision is to show that the lower courts here have deviated, not only from standards followed by other courts of appeals in both federal question and diversity cases, but also from the Eighth Circuit's own standards and rules governing the application of state law, and that this deviation has become more significant and more destructive of the true and original standard as each new case is decided. This snowball effect which can be observed in the opinions of the court of appeals requires prompt correction by this Court. *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950).

The startling inattention of the court of appeals to its own rules of decision as well as to those of this Court becomes altogether shocking when considered with the fact that the courts below appear to apply a given rule of decision in an arbitrary and capricious way: While "federal law" was selected for determining some of petitioner's rights and duties under the bond and subcontracts, state law was selected for determining its other rights and duties under the same bond and subcontracts. 353 F.2d at 176-177; 234 F. Supp. at 818-819. How, under these circumstances, are litigants to know what law applies to their transaction or to any part of it?

Surely the *Erie* rules cannot be interpreted to permit so grotesque a result as that achieved by the lower courts here. The lesson of *Rogers* v. *Missouri Pacific Ry.*, 352 U.S. 500, 510 (1957), should therefore be applied: Because the lower federal courts in this case have persistently and arbitrarily misapplied the governing legal standard, "special and important reasons for the grant of certiorari . . . are certainly present."

C. As to the "federal interest" in subcontracts or subcontract bonds justifying the imposition of a uniform federal rule.

As already stated, the sole reason for applying federal law to the issues raised in the case appears to be "the federal interest inherent in Capehart projects" (353 F.2d at 172), or "uniformity in connection with all of the various problems growing out of the extensive Capehart litigation" (234 F. Supp. at 309). At neither the trial nor appellate level is this "federal interest" or the reasons for "uniformity" in a case of this sort more specifically described. In view of the fact that it furnishes the occasion for an outright departure from *Erie*, the supposed federal interests at stake deserve a more careful definition and critical evaluation.

National submits that in fact the federal government has *no* interest, direct or remote, in the outcome of this litigation. Since all of the materialmen in question have been paid, the policy of the Miller and Capehart Acts to protect materialmen on government contracts is not involved. Since also the Fort Leonard Wood structures have been built and paid for, the federal government has no interest in the dispute of D & L and its surety, Continental Casualty, with National, Mojave's surety, as to who should bear the loss arising out of Mojave's default. There is "no decisional or doctrinal justification for applying

judge-made federal common law to a private dog-fight in which the federal government's interest, if any, seems . . . to be that of a bored spectator."[31] Mere uniformity in and of itself is not sufficient to justify the disregard of *Erie* and the imposition of federal rules of decision. *Bank of America* v. *Parnell*, 352 U.S. 29, 33-34 (1956).[32] Indeed the Solicitor General's brief before the Supreme Court in *Wallis* v. *Pan American Petro. Corp., supra*, vindicates National's position. There the Solicitor General argued that the rights of the litigants could properly be left to determination under principles of state law because the claims in that case were not based upon any alleged violation of a federal statute, regulation or order, the validity of the lease of the United States under the Mineral Leasing Act of 1920 was not in issue, the United States itself was not a party to the transaction in suit, and the application of state law would not undermine some federal interest or policy drawn from the Mineral Leasing Act of 1920.[33] Likewise the rights of the litigants here can be and should be left to determination under principles of state law because the claims are not based upon any violation of federal statute, regulation or order, the validity of the subcontracts and bond under the Capehart Act is not in issue, the United States is not a party to the transaction in suit and the application of state law would not undermine some federal interest or policy drawn from the Capehart or Miller Acts.

Finally, it must be remembered that Congress has had ample opportunity, during the formulation of extensive

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31. Dissent of Judge Wisdom in *McKenna* v. *Wallis*, 344 F.2d 432, *on rehearing*, 344 F.2d 439 at 452, *cert. granted*, 34 U.S.L.Week 3102 (U.S. Oct. 11, 1965).

32. See also *McKenna* v. *Wallis*, 344 F.2d 432, *on rehearing*, 344 F.2d 439 at 452 (5th Cir. 1965) (dissent).

33. Memorandum for the United States as Amicus Curiae, pp. 7-8, 10-14; *Wallis* v. *Pan-American Petro. Corp., supra.*

legislation on government building programs[34] to overrule all the cases cited above and to supplant state law with uniform federal rules. It has not done so, either as to subcontract disputes in federal court merely because of diversity in the parties' citizenship, or in suits actually filed under the Miller and Capehart Acts.[35] This fact alone, when considered with the substantial practical problems of limiting the reach of such federal rules, demonstrates the unsoundness, even carelessness, of the decisions below.

III. As to the Incorporation, As a Matter of Federal Law, of the Prime Contract into the Subcontract.

The court of appeals' ruling in *American Cas. Co.* v. *Brezina Constr. Co.*, 295 F.2d 603 (8th Cir. 1961), was regarded as pivotal in opinions written at the trial and appellate levels. *Brezina* was apparently construed as establishing two distinct propositions: (1) federal (not state) law is to be applied not only to prime contract bonds required by federal statute but also to private subcontract bonds issued solely at request of the prime contractor (234 F. Supp. at 308-309 and 353 F.2d at 172), and (2) as a matter of federal law, all terms of Miller and Capehart Act prime contracts are to be incorporated into the subcontracts and a subcontract bond must be viewed and interpreted in light of the provisions of the subcontract and the general contract (234 F. Supp. at 308 and 353 F.2d at 172).

Aside from the fact that *Brezina* hardly stands for either of the propositions for which it was cited,[36] even if it did,

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34. See n. 16, *supra*, p. 16.

35. See *Meyer* v. *United States*, 375 U.S. 233, 239 (1963); *United States* v. *Standard Oil Co.*, 332 U.S. 301, 310 (1947).

36. Since the subcontract in *Brezina* explicitly incorporated within it by reference *all* of the provisions of the prime contract and specifically committed the subcontractor to be bound to the prime contractor by the terms of the prime contract. See 295 F.2d 607, n. 7.

serious departures from the rule of construction announced in *Guerini Stone Co.* v. *Carlin Constr. Co.*, 240 U.S. 264 (1915), are indicated.

The true rule concerning the relationship between the prime and subcontracts is that employed by this Court in the *Guerini* case. That case arose out of difficulties encountered during the construction of the United States Post Office in San Juan, Puerto Rico. Carlin, the prime contractor on the job, subcontracted to Guerini certain of the concrete and granite work. Carlin's prime contract with the government provided that the latter had the right to suspend work on the project whenever it might be "necessary for the purposes or advantage of the work," and that the government would not be responsible to Carlin for any damages which might accrue because of such a delay. The General Conditions attached to the prime contract contained a similar provision. Guerini's subcontract, however, said nothing about delays caused by the government. Instead, it provided that Carlin would provide materials to Guerini "in such a manner as not to delay the material progress of the work." After certain delays Guerini notified Carlin that it regarded the subcontract as having been breached and thereafter filed suit to recover its anticipated profits and damages.

Although Carlin made some attempt to controvert the facts alleged by Guerini, its primary defense bore striking resemblance to that advanced by D & L in the case at bar and sustained by the courts below. It pointed out that its own contract with the government allowed the latter to halt work on the project without responsibility for damages caused by the delay. Guerini must be charged with notice of this right of the government, it argued, and the work-stoppage provisions were to be "read into" the subcontracts.

The trial court sustained this position and admitted the prime contract into evidence over Guerini's objections. On appeal to this Court, this ruling was unanimously reversed. The subcontractor was not bound by the provisions of the prime contract, this Court held, even though it might have had notice of those provisions, and reference in the subcontract to the plans and specifications for the building was not a valid basis for incorporating the terms of the prime contract itself into the subcontract.[37]

The reference in the subcontract here involved to "contract documents" (R. 8, 9, 11) is exactly the kind of reference to plans and specifications which this Court held in *Guerini* to be insufficient to incorporate the terms of the prime contract itself into the subcontract.

The obvious conflict of the decisions below with *Guerini*, and the failure to administer properly the rule of construction pronounced in *Guerini* justifies the exercise of this Court's power of supervision over the lower federal courts and the grant of certiorari to correct the misapplication of the governing legal rule.

CONCLUSION

For all of the reasons stated, this Court should grant certiorari, summarily reverse the decision of the court below, and remand the case for determination under appropriate state law. The decision below is a serious departure from the constitutional rule allocating responsibility be-

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37. 240 U.S. at 277. *Accord, Woodruff* v. *Hough*, 91 U.S. 596 (1875); *R. P. Farnsworth & Co.* v. *Tri-State Constr. Co.*, 271 F.2d 728 (5th Cir. 1959) (Capehart project); *Battista* v. *Horton, Meyers & Raymond*, 128 F.2d 29 (D.C. Cir. 1942); *H. P. Cummings Constr. Co.* v. *Marbleaid Co.*, 51 F.2d 906 (3rd Cir. 1934); *Miller* v. *Hamilton*, 216 Fed. 131 (8th Cir. 1914); *Shanks* v. *Wilson*, 86 F. Supp. 789 (S.D. W. Va. 1949); *Moses* v. *Edward H. Ellis, Inc.*, 4 N.J. 315, 72 A.2d 856 (1950).

tween the federal and state courts and as such clearly conflicts with and fails to obey *Erie R.R. Co.* v. *Tompkins* and the Rules of Decision Act, 28 U.S.C.A. § 1652. The decision below adopts a theory of decision respecting the scope of an undefined "federal interest" which this Court rejected as recently as January, 1966, in *United States* v. *Yazell.* Considering further the conflict of the decision below with decisions of other courts of appeals, as well as the general importance of the questions raised by this petition for the administration of federal construction and procurement programs, the decision of the court of appeals in the instant case should be reviewed and reversed.

Summary reversal is called for in this case. Such reversal here is consistent with the Court's practice in cases not only where the law is settled by prior decision,[38] but also where the action of the lower court was clearly improper.[39]

Respectfully submitted,

DOUGLAS STRIPP
CLAYTON R. SMALLEY
LANDON H. ROWLAND
1006 Grand Avenue
Kansas City, Missouri 64106
Attorneys for Petitioner

Of Counsel:
WATSON, ESS, MARSHALL & ENGGAS

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38. *Alleghany Ct.* v. *Breswick & Co.*, 355 U.S. 415 (1958); *U. S.* v. *Palletz*, 330 U.S. 812 (1947), and five subsequent cases summarily reversed on the authority thereof reported in 330 U.S. 812 and 331 U.S. 791.

39. *Franklin* v. *Jones Aircraft Corp.*, 346 U.S. 868 (1953); *White* v. *Howard*, 347 U.S. 910 (1954), and *Riss & Co.* v. *U. S.*, 342 U.S. 937 (1952).